PREME COURT
FEB 25 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 780

THE FRANKLIN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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This supplemental brief is filed to call to the Court's attention an intervening decision of the Tax Court on February 24, 1969, on petition for reconsideration in the case of *Western National Life Ins. Co.*, the earlier decision in which case has been cited by the parties to the Court.

In our Petition for Certiorari (p. 19) we referred to the decision of the Tax Court in *Western National* (50 T.C., No. 28, May 13, 1968, CCH Tax Ct. Rep. § 28,954), in which the Tax Court took a position in conflict with that of the court below as to whether premiums deferred and uncollected should be included in a life insurance company's assets for the purpose of those computations to which a comparison between assets, on the one hand, and liabilities to policyholders, on the other, is pertinent.

In its Brief in Opposition, the Government (Br. Op. 16-17) called attention to the facts that: (a) the Tax Court decision was then subject to a petition for reconsideration which the Commissioner of Internal Revenue had filed on May 31, 1968, and (b) the decision of the Tax Court went further than the position we had taken, in that its decision was that premiums deferred and uncollected should be excluded altogether in the computation, and that there should not even be admitted in the computation a "matching" amount in order to wring out the reserves allocable to the premiums deferred and uncollected, which is the position which we have taken. See Petition, pp. 9-10.

As we pointed out in our Reply Brief (Rep. Br. 15 n. 13), these circumstances hardly negated the conflict between the original decision of the Tax Court and the decision of the court below. The initial decision of the Tax Court was that no part of premiums deferred and uncollected should be included in assets, and the decision of the Court of Appeals below was that the gross amount of premiums deferred and uncollected should be included in assets. However, on February 24, 1969, the Tax Court ruled on the petition for reconsideration, and, in so ruling, adopted our position *in toto*.

The Tax Court, upon petition for reconsideration, ruled that the loading on premiums deferred and uncollected should not, despite the Government's contentions, be included in a life insurance company's assets. It did, however, rule, in accordance with our position, that the premiums deferred and uncollected should be reflected in assets, pursuant to the NAIC form treatment of them, to the extent necessary to match and to "wring" out the related reserves with respect to the premiums deferred

and uncollected. A copy of the court's opinion is attached as Appendix A.[1]

Accordingly, the Tax Court has now decided one of the basic issues as to premiums deferred and uncollected completely in accordance with our position. It has also disposed of the Petition for Reconsideration filed by the Government. It has indicated its belief, so contradictory to the approach of the Government, that: "The legislative history of the Life Insurance Company Income Tax Act of 1959 indicates that Congress was attempting to tax all of a life insurance company's share of its gross income, both investment income and underwriting income, in a manner as consistent as possible with the accounting procedures required to be used by the company by State regulatory agencies."

Thus, not only does the flat conflict between the decision of the Tax Court in *Western National* and the decision

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[1] The position of the Tax Court on the question whether premiums deferred and uncollected should be reflected in gain from operations is unclear. That question was not involved in the *Western National* case. At one point in its opinion, the Tax Court appears to assume, at least *arguendo*, that premiums deferred and uncollected should be reflected in gain from operations, but then denies that it follows from that that the loading thereon should be included in assets. At another point, it appears to take the position that the loading is not includible in gain from operations until the amount of it which constitutes income is determined, *i.e.*, until the premiums are actually received and the expenses chargeable against them are incurred. Of course, the entire discussion of the gain from operations aspects of the inclusion of premiums deferred and uncollected in the Tax Court's opinion is dictum. The court's opinion does (footnote 4) contain the erroneous recital that the present petitioner conceded in the Court of Appeals that the gross premiums deferred and uncollected were to be included in gain from operations. Presumably, this assertion was due to a misstatement on the part of the Government similar to that made in its Brief in Opposition here (Br. Op. 10; see the reply in our Rep. Br. 10 n. 7), which we could not correct since we were not a party to the *Western National* case.

of the Court of Appeals below remain, but the reasons adduced by the Government why that conflict was no ground for the grant of certiorari have now been removed.

CONCLUSION

For the reasons stated in the Petition for Certiorari, our Reply Brief, and herein, certiorari should be granted.

Respectfully submitted,

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